No. 84-1539

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MICHIGAN

Petitioner,

v.

RUDY BLADEL,

Respondent.

On Writ Of Certiorari To The Michigan Supreme Court

BRIEF FOR RESPONDENT BLADEL

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SUMMARY OF ARGUMENT

At the time of Respondent Bladel's confession, his right to counsel had attached under both the Fifth and Sixth Amendments. Respondent had already made his first appearance at the district court arraignment where he had requested the appointment of counsel for all proceedings. The adversary proceedings had clearly commenced.

Respondent's Sixth Amendment right to counsel, in effect at the time of the interrogation, is a much broader right than the Fifth Amendment right to counsel. While the Sixth Amendment right applies to all critical stages of the criminal proceedings, the judicially created Fifth Amendment right only protects the accused's right against self-incrimination during custodial interrogation. While both rights apply to post-arraignment communication with the police as in this case, the Fifth Amendment violation requires a showing of custodial interrogation while the Sixth Amendment can be violated merely by deliberate elicitation of incriminating statements whether in a custodial or non-custodial setting. Also, a waiver of the Fifth Amendment right to counsel can be found by a showing that a suspect was advised of his *Miranda* rights and subsequently answered questions without any affirmative statement of waiver. Conversely, this Court has refused to find waiver in a Sixth Amendment "deliberate elicitation" case where the right to counsel was not affirmatively waived. These distinctions support the argument that the Sixth Amendment right is broader and less easily waived.

Because the Sixth Amendment right to counsel is a greater right than the corresponding Fifth Amendment right, waiver of the Sixth Amendment cannot be based upon the Fifth Amendment *Miranda* warnings. A Sixth Amendment waiver requires a higher level of comprehension on the part of the defendant to be truly knowing and

voluntary. The rule designed by this Court for waiver of the Sixth Amendment right *at trial* has application in the Sixth Amendment interrogation setting. The defendant should be advised not only of his right to counsel but also the fact of the indictment, the significance of the indictment and the seriousness of the defendant's situation should he choose to answer questions without counsel present. This waiver rule has been adopted by the Second Circuit Court of Appeals to assure actual comprehension of the Sixth Amendment right. Certainly, Respondent Bladel's alleged waiver of his *Miranda* rights did not meet this higher standard.

Even if this Court does not decide to set a higher waiver standard for the Sixth Amendment, this Court should find that a defendant who has invoked his Sixth Amendment right should be protected from police invitations to waive that right just as an accused who has exercised his lesser Fifth Amendment right is protected. Thus, the Fifth Amendment rule that bars police initiated interrogation of an accused who has indicated to the police that he desires a lawyer should be applied with equal force under the Sixth Amendment to the indicted defendant.

The above rule, adopted by the Michigan Supreme Court, is consistent with this Court's "bright line" cases. The rule will only serve to protect a defendant's Sixth Amendment right to counsel and to simplify questions of whether the right to counsel was violated. Courts will not have to draw unnecessary distinctions concerning the type of request for counsel: any request for counsel by a criminal suspect or criminal defendant bars further police initiated interrogation in the absence of counsel. This Court should adopt such a rule.

Finally, even if the Sixth Amendment is not deemed to protect a defendant from further police initiated interrogation after a request for counsel, this Court can find that Respondent Bladel's indication to the interrogating officers, after the reading of the *Miranda* advice, that he had requested counsel at arraignment, was a sufficient exercise of Respondent's Fifth Amendment right to counsel to bar further interrogation. The officers' absolute indifference to Respondent's indication that he had already requested counsel was a violation of Respondent's Fifth Amendment right which requires suppression of Respondent's confession.

ARGUMENT

On March 27, 1979, three days after his request at arraignment for the appointment of counsel, but one day prior to his first meeting with counsel, Respondent Rudy Bladel was visited in the Jackson County Jail by two police officers. The officers advised Respondent of his *Miranda*[1] rights including the right to counsel. At the point counsel was mentioned, Respondent indicated that he had requested counsel at his arraignment. The officers responded by asking Respondent to waive his right to counsel. Respondent signed a waiver of his rights and confessed to three murders.

The Michigan Court of Appeals reversed Respondent's convictions and held that his confession was illegally obtained on the authority of *Edwards* v. *Arizona*, 451 U.S. 477; 101 S.Ct. 1880; 68 L.Ed.2d 378 (1981); *People* v. *Bladel*, 118 Mich. App. 498; 325 N.W.2d 421 (1982). On appeal by the prosecutor (Petitioner herein), the Michigan Supreme Court affirmed the decision of the Court of Appeals, holding that the Sixth and Fourteenth Amend-

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[1] *Miranda* v. *Arizona*,384 U.S. 436; 86 S.Ct. 1602; 16 L.Ed.2d 694 (1966).

ments[2] protect an accused from continued police interrogation after the accused has invoked his right to counsel at arraignment by requesting the appointment of counsel. *People* v. *Bladel (After Remand)*, 421 Mich. 39; 365 N.W.2d 56 (1984).

In reaching the above decision, the Michigan Supreme Court relied upon the following analysis:

> 1) At the time of Respondent's confession, his right to counsel had attached under both the Fifth[3] and Sixth Amendments;
>
> 2) The Sixth Amendment right to counsel is at least as important as the judicially created Fifth Amendment right, if not more so;
>
> 3) The Sixth Amendment right to counsel is considerably broader than the Fifth Amendment right;
>
> 4) A waiver of the greater Sixth Amendment right to counsel after that right has been invoked cannot be based soley on a waiver of the Fifth Amendment *Miranda* rights;
>
> 5) At a minimum, the protections afforded pursuant to *Edwards* v. *Arizona* to an accused who has invoked his lesser Fifth Amendment right must be extended, by analogy, to the accused who has invoked his Sixth Amendment right.

The Michigan Supreme Court correctly found that because Respondent Bladel was subjected to police-initiated interrogation after he had requested the appointment of counsel, his subsequent confession had to be suppressed. This holding is consistent with the prior rulings of this Court. Indeed, the Michigan Court's decision

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[2] U.S. Const. Ams. VI, XIV.

[3] U.S. Const, Am. V.

is the logical result of this Court's prior rulings on the importance and sanctity of the Sixth Amendment right to counsel. The decision of the Michigan Supreme Court should be affirmed.

Respondent's Sixth Amendment Right Had Attached.

Initially, it is clear that at the time of the post-arraignment interrogation, Respondent's Sixth Amendment right to counsel had attached. In fact, Respondent explicitly exercised that right at arraignment by requesting the appointment of counsel. This Court has repeatedly held that the Sixth Amendment right attaches as soon as judicial proceedings are initiated against the accused, "whether by way of formal charge, preliminary hearing, indictment, information or arraignment." *Kirby* v. *Illinois*, 406 U.S. 682, 689; 92 S.Ct. 1877, 1882; 32 L.Ed.2d 411 (1972); *United States* v. *Gouveia*, ___ U.S. ___; 104 S.Ct. 2292, 2296; 81 L.Ed.2d 146 (1984).

Moreover, the Sixth Amendment is not limited to the courtroom. In *Brewer* v. *Williams*, 430 U.S. 387, 401; 97 S.Ct. 1232, 1240; 51 L.Ed.2d 424 (1977), this Court reiterated that under the Sixth Amendment, "once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him."

Despite this Court's very clear statements concerning the attachment of the Sixth Amendment at the initial arraignment, Petitioner argues that Respondent's Sixth Amendment right did *not* attach at his arraignment.[4]

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[4] Petitioner did not argue below that the Sixth Amendment had not attached. Indeed, Petitioner has previously conceded that Respondent's Sixth Amendment right had attached at the time of the post-arraignment interrogation. *People* v. *Bladel*, supra, 421 Mich. at 77 (Boyle, J., dissenting).

Apparently, Petitioner would have this Court rule that a criminal defendant in Michigan does not have a Sixth Amendment right to counsel until he walks into the courtroom for the preliminary examination, up to twelve days after the initial arraignment. See Petitioner's Brief, pp. 20, 25-26.

Petitioner's argument on this point is without any support in the caselaw. In fact, Petitioner's argument ignores this Court's very specific language on the importance of the assistance of counsel as soon as the prosecution has begun:

> This view no more than reflects a constitutional principle established as long ago as *Powell* v. *Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, where the Court noted that "* * * during perhaps the most critical period of the proceedings * * * that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation [are] vitally important, the defendants * * * [are] as much entitled to such aid [of counsel] during that period as at the trial itself. *Id.*, 287 U.S., at 57, 53 S.Ct., at 59, 77 L.Ed. 158. *Massiah* v. *United States*, 377 U.S. 201, 205; 84 S.Ct. 1199, 1202; 12 L.Ed.2d 246 (1964).

As the Michigan Supreme Court held and as Petitioner had previously conceded, Respondent Rudy Bladel was entitled, under the Sixth Amendment, to the assistance of counsel when he was "faced with the prosecutorial forces of organized society" at his post-arraignment interrogation. *Kirby* v. *Illinois*, supra, 406 U.S. at 689.

The Sixth Amendment Right To Counsel Is A Broader And More Fundamental Right Than The Judicially Created Fifth Amendment Right To Counsel.

As noted, prior to the post-arraignment interrogation, the Jackson police detectives read Respondent his

Miranda rights and obtained from him a signed waiver of those rights. Petitioner argues that despite the fact that the police were aware that Respondent had previously requested but not yet consulted with counsel, Respondent's apparent waiver of his *Miranda* rights was sufficient to waive whatever right to counsel he may have had. Such an argument unfairly diminishes the effect of Respondent's request for counsel and denigrates the importance of the Sixth Amendment.

This Court must first recognize, as did the Michigan Supreme Court, the differences between the Fifth and Sixth Amendments and the respective rights to counsel. Originally, the right to the assistance of counsel was only required within the scope of the Sixth Amendment: *after* the initiation of the criminal prosecution. *Powell* v. *Alabama*, supra. However, in *Miranda* v. *Arizona*, supra, this Court held that a criminal suspect has a right under the Fifth Amendment to have counsel present during any custodial interrogation. This right to counsel applies regardless of whether judicial proceedings have been initiated against the accused and thus, is independent of the Sixth Amendment right to counsel. In order to make the Fifth Amendment protections effective, the Court developed the requirement of warnings whereby the interrogator must advise the suspect that he has the right to remain silent, that anything said can and will be used against him, and that he has the right to consult with an attorney and have one present during questioning. 384 U.S. at 467-473.

If these warnings are given and understood by the accused and the accused agrees to speak to the authorities without asserting any of the rights, the Fifth Amendment protections can be effectively waived. *North Carolina* v. *Butler*, 441 U.S. 369; 99 S.Ct. 1755; 60 L.Ed.2d

286 (1979). However, if the suspect asks to speak to a lawyer, he is not subject to further interrogation until counsel has been made available, unless the accused himself initiates further communication with the police. *Edwards* v. *Arizona*, supra.

The more fundamental right to counsel is found in the Sixth Amendment. As discussed above, the purpose of the Sixth Amendment right to counsel is to provide legal assistance throughout all critical stages of the criminal judicial process. It is, therefore, much broader than the right to counsel conferred by the Fifth Amendment which "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature." *Schmerber* v. *California*, 384 U.S. 757, 761; 86 S.Ct. 1826, 1830; 16 L.Ed.2d 908 (1966). Moreover, not only is the Sixth Amendment right to counsel broader in purpose and scope than the corresponding Fifth Amendment right, but also "the policies underlying the two constitutional protections are quite distinct." *Rhode Island* v. *Innis*, 446 U.S. 291, 300, n.4; 100 S.Ct. 1682, 1689, n.4; 64 L.Ed.2d 297 (1980).

That the two constitutional protections are distinct is demonstrated by this Court's decisions in the three major cases concerning the Sixth Amendment right to counsel during police elicitation of incriminating statements. *Massiah* v. *United States*, supra; *Brewer* v. *Williams*, supra; *United States* v. *Henry*, 447 U.S. 264; 100 S.Ct. 2183; 65 L.Ed.2d 115 (1980). These cases establish two important distinctions between the Fifth and Sixth Amendment rights, both of which lead to the conclusion that the Sixth Amendment right to counsel is broader and more difficult to waive.

In order to show a violation of the Fifth Amendment, the defendant must first show that he was subject to custodial police interrogation. *Miranda* v. *Arizona*, supra, 384 U.S. at 444. A Sixth Amendment violation on the other hand, does not require interrogation but merely "deliberate elicitation" of incriminating statements. *United States* v. *Henry*, supra, 447 U.S. at 272. Moreover, such elicitation without counsel can violate the Sixth Amendment even in the absence of custody. *Massiah* v. *United States*, supra, 377 U.S. at 206.

The second major distinction between the two corresponding rights to counsel involves waiver. As noted earlier, a waiver of the Fifth Amendment right to counsel can be found by a showing that the suspect was advised of his *Miranda* rights and subsequently answered questions without any affirmative indication of waiver. *North Carolina* v. *Butler*, supra, 441 U.S. at 374. In *Brewer* v. *Williams*, supra, 430 U.S. at 405, the Court held that the defendant did not validly waive his Sixth Amendment right to counsel where he did not affirmatively relinquish it prior to the police officer's deliberate elicitation of incriminating statements. Thus, while the Fifth Amendment does not necessarily require an explicit waiver, the Sixth Amendment clearly does.

This Court's prior decisions strongly support the conclusion of the Michigan Supreme Court that the Sixth Amendment right to counsel during interrogation must be at least as important and effective as the Fifth Amendment right. Certainly, the Sixth Amendment right is "considerably broader than its Fifth Amendment counterpart since it applies to all critical stages of the prosecution." *People* v. *Bladel*, 421 Mich. at 53. The Petitioner's contention that the right to counsel invoked by Respond-

ent at arraignment was a "narrow right" which did not differ in purpose and scope from the Fifth Amendment right must be rejected.

The Fifth Amendment Waiver Conceived In The *Miranda* Decision Is Not Adequate To Waive The Greater Sixth Amendment Right To Counsel.

Because the Sixth Amendment right to counsel is a greater right than that provided by the Fifth Amendment, it follows that the Miranda warnings/waiver, designed strictly to protect a suspect's right against self-incrimination in a pre-indictment, custodial setting, cannot provide the basis for a knowing waiver of an indicted defendant's Sixth Amendment right. This conclusion is merely a logical extension of this Court's Sixth Amendment decisions.

A general, but strict, standard for waiver of the Sixth Amendment right to counsel was stated by this Court in *Johnson* v. *Zerbst*, 304 U.S. 458, 464; 58 S.Ct. 1019; 82 L.Ed. 1461 (1937): "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."

Thus, the State bears the heavy burden of showing that the accused both comprehended and relinquished his right to counsel. Moreover, the courts must indulge in every reasonable presumption against waiver. *Brewer* v. *Williams*, supra, *Bookhart* v. *Janis*, 384 U.S. 1; 86 S.Ct. 1245; 16 L.Ed.2d 314 (1966).

This Court has held that the *Johnson* v. *Zerbst* waiver standard applies both in cases of alleged waiver of the Fifth Amendment right, *Edwards* v. *Arizona*, supra, 451 U.S. at 482, and alleged waiver of the Sixth Amendment right. *Brewer* v. *Williams*, supra, 430 U.S. at 404. Nevertheless, this Court seems to have applied that standard

more strictly in Sixth Amendment cases. Moreover, many other courts and commentators have come to the conclusion that a waiver of *Miranda* rights is inadequate to waive the greater Sixth Amendment right to counsel.

As discussed above, the *Brewer* decision indicates that a Sixth Amendment waiver must be explicit while a Fifth Amendment waiver, under *North Carolina* v. *Butler*, need not be. Thus, the Sixth Amendment must be harder to waive as it requires some spoken or written statement of waiver by the defendant.

The only case in which this Court has fully discussed the requirements for a Sixth Amendment waiver is *Faretta* v. *California*, 422 U.S. 836; 95 S.Ct. 2525; 45 L.Ed.2d 562 (1975). This Court, applying the knowing relinquishment standard of *Johnson* v. *Zerbst*, supra, found a valid waiver of defendant's Sixth Amendment right to counsel *at trial*. However, the Court emphasized that before such a waiver could be knowing, defendant:

> . . . should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open." *Adams* v. *United States*, [317 U.S. 269, 279; 63 S.Ct. 236, 242; 87 L.Ed. 268 (1942)]; *Faretta* v. *California*, supra, 422 U.S. at 835.

According to the *Faretta* decision then, a waiver of the right to counsel at trial requires that the defendant asserting his right to waive clearly understand the risks of proceeding without counsel and that this advice of risks be imparted by the trial judge. Unlike the requirements for Fifth Amendment waiver under *Miranda* where the suspect must only be advised of the right itself, Sixth Amendment waiver under *Faretta* requires comprehension of the risk of waiving the right. Thus, a much higher

standard of comprehension is required to show waiver of the Sixth Amendment as opposed to the Fifth Amendment right to counsel.

Although this Court has never explicitly addressed the issue of whether this higher standard of waiver is applicable to pretrial waivers under the Sixth Amendment, the Court has indicated that the stricter standard is applicable to all waivers of the Sixth Amendment right to counsel. In *Brewer* v. *Williams*, supra, the Court, as in *Faretta*, applied the knowing relinguishment standard of *Johnson* v. *Zerbst*, supra, and stated:

> This strict standard applies equally to an alleged waiver of the right to counsel whether at trial or of a critical stage of pretrial proceedings. 430 U.S. at 404.

Due to the greater importance of the Sixth Amendment right to counsel and the greater protections afforded the accused under the Sixth Amendment, all allegations of waiver under the Sixth Amendment must be judged under the *Faretta* standards and not the more lenient Fifth Amendment-*Miranda* standards. Although this position has never been explicitly adopted by the United States Supreme Court, it has gained much support among various courts and commentators. A clear rationale for the rule was aptly stated as follows:

> The Supreme Court's decision to find the sixth amendment right to counsel relevant only at or after the initiation of adversary judicial proceedings suggests that the *sixth amendment right should be more difficult to waive than the analogous fifth amendment right*. The assistance of counsel assumes greater importance in the crucial stage after the filing of formal charges for two reasons. First, the attorney no longer serves merely as a defensive shield to protect the suspect from self-incrimination, but becomes the accused's representative in conflict

> with the mobilized prosecutorial forces of the state. Second, once prosecution has commenced, the attorney must guide the accused through the substantive and procedural complexities of the criminal law. Furthermore, the state's need for the accused's confession is also greatly diminished, as indictment presumably indicates that the state has gained sufficient evidence to prove the guilt of the accused. *Under these circumstances, the state should be subject to a greater burden in establishing relinquishment of the more important sixth amendment right than in establishing relinquishment of the fifth amendment right*. Note, *Proposed Requirements for Waiver of the Sixth Amendment Right to Counsel*, 82 Col. L. Rev. 363, 372-373 (1982); (emphasis added; footnotes omitted).[5]

The Second Circuit Court of Appeals applied a higher Sixth Amendment waiver standard in *Unites States* v. *Mohabir*, 624 F.2d 1140 (CA 2, 1980). In *Mohabir*, defendant was interrogated by the prosecutor following indictment but prior to the appointment of counsel. At the interrogation, the prosecutor gave defendant his *Miranda* warnings which defendant agreed to waive. In fact, both parties on appeal agreed that *Miranda* had been complied with. The Second Circuit found that the *Miranda* waiver was only the beginning of the analysis as defendant's Sixth Amendment right to counsel had

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[5] See also: Grano, *Rhode Island* v. *Innis: A Need to Reconsider the Constitutional Premises underlying the Law of Confessions*, 17 Am. Crim. L. Rev. 1, 35 (1979) [". . . no effort to elicit information from the defendant should occur unless the police seek to notify counsel. In cases where no lawyer exists to be notified, a waiver should be required to meet the standards that govern waiver of the right to counsel at trial. Any other standard undermines *Massiah*'s rationale."]
Note *Sixth Amendment Right to Counsel: Standards for Knowing and Intelligent Pretrial Waivers*, 60 B.U.L. Rev. 738 (1980).

attached at the indictment and that "waivers of Sixth Amendment rights must be measured by a 'higher standard' than are waivers of Fifth Amendment rights." *Id*, at 1146.

Following an extensive review of United States Supreme Court decisions as well as earlier decisions from the Second Circuit, the *Mohabir* Court held that a valid waiver of the Sixth Amendment right to counsel during post-indictment interrogation "must be preceded by a federal judicial officer's explanation of the content and significance of this right." *Id*, at 1153. Such an explanation must include the fact that the indictment has been filed, the significance of the indictment, the right to counsel and "the seriousness of [the accused's] situation in the event he should decide to answer questions . . . in the absence of counsel." *Id*. The Court held that only such a complete advice of rights would assure comprehension of the Sixth Amendment right pursuant to *Brewer* v. *Williams* and *Faretta* v. *California*.

The *Mohabir* decision was not a radical departure from earlier cases but merely the culmination of prior decisions of the Second Circuit which had held that any waiver under the Sixth Amendment had to be governed by higher standards than a Fifth Amendment waiver. See *Carvey* v. *LeFevre*, 611 F.2d 19 (CA 2, 1979), cert denied, 446 U.S. 921; 100 S.Ct. 1858; 64 L.Ed.2d 276 (1980); *United States* v. *Satterfield*, 558 F.2d 655 (CA 1, 1976). A Sixth Amendment waiver "requires the clearest and most explicit explanation and understanding of what is being given up." *Carvey* v. *LeFevre*, supra, at 22, n.1. Accordingly, the mere giving of *Miranda* warnings may not suffice to call the defendant's attention to the enormity of his contemplated decision.[6]

[6] Other jurisdictions, while not imposing the Second Circuit's strict *Faretta*-type waiver rule, have recognized that a Sixth Amendment waiver requires a higher level of comprehension on the part of the defendant than is provided by *Miranda* warnings. See *United States* v. *Clements*, 713 F.2d 1030 (CA 4, 1983); *State* v. *Wyer*, 320 SE.2d 93 (W. Va. 1984); *State* v. *Sparklin*, 296 Or. 65; 672 P.2d 1182 (1983).

Applying the *Mohabir/Faretta* waiver standards to the instant case, it is clear that Respondent Bladel did not knowingly waive his Sixth Amendment right to counsel. At no time did anyone advise Respondent of the nature of his Sixth Amendment right to counsel. Certainly Respondent's alleged waiver was not made with the intelligence and knowledge that he would have obtained had he consulted with counsel. Indeed, Respondent Bladel had not spoken with any attorney, other than the prosecutor, prior to making his statements. Respondent was not only counselless at the time of interrogation, he was uncounselled.

Due To The Greater Importance Of The Right To Counsel After Initiation Of Judicial Proceedings And The Higher Waiver Standard Of The Sixth Amendment, The Prophylactic Rule Of *Edwards* v. *Arizona* Should Be Extended To The Sixth Amendment.

The Michigan Supreme Court in this case did not undertake to define precise requirements for waiver of the Sixth Amendment right to counsel. The Court merely held that because the Sixth Amendment provides a greater and more fundamental right to counsel than the Fifth Amendment and because the Fifth Amendment waiver of *Miranda* rights is adequate to waive the Sixth Amendment once it attaches, the Sixth Amendment right "is entitled to be protected by procedural safeguards at least as stringent as those designed for its lesser counterpart." *People* v. *Bladel*, supra, 421 Mich. at 65.

One of the primary safeguards of the Fifth Amendment right to counsel and a direct result of this Court's land-

mark decision in *Miranda* v. *Arizona*, supra, is the rule of *Edwards* v. *Arizona*, supra. In *Edwards*, a confession was obtained by continued police interrogation after defendant had advised the police of his desire to have counsel present. This Court found that the continued interrogation in the absence of counsel violated defendant's right to counsel under *Miranda* v. *Arizona*, supra. The Court stated its holding as follows:

> We now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as *Edwards*, having expressed his desire to deal with the police through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police. *Edwards*, supra, 451 U.S. at 484-485.

It is entirely logical and consistent with the Constitution to extend the *Edwards* Fifth Amendment rule to situations implicating the Sixth Amendment right to counsel as the Michigan Supreme Court has done. The distinctions drawn by Petitioner, that *Edwards* should be limited to Fifth Amendment cases only and that Respondent herein did not direct his request for counsel to the police but to a judge, do not support his conclusion that the strict requirements of *Edwards* cannot apply to an indicted defendant who has "only" invoked his Sixth Amendment right. As the Michigan Supreme Court stated:

> Although judges and lawyers may understand and appreciate the subtle distinctions between the Fifth and Sixth Amendment rights to counsel, the average person does not. When an accused requests an attorney, either before a police officer or a magistrate, he does not know which constitutional right he is invoking; he therefore should not be expected to articulate exactly why or for what purposes he is seeking counsel. *It makes little sense to afford relief from further interrogation to a defendant who asks a police officer for an attorney, but permit further interrogation of a defendant who makes an identical request to a judge*. The simple fact that defendant has requested an attorney indicates that he does not believe that he is sufficiently capable of dealing with his adversaries singlehandedly. As Justice Marshall noted, if we are to distinguish cases solely on the wording of an accused's request and to whom it is made, the value of the right to counsel would be substantially diminished. *People* v. *Bladel*, supra, 421 Mich. at 63-64.

Petitioner's argument not only "makes little sense," it is inherently illogical. Petitioner would have this Court hold that for purposes of waiver of the Sixth Amendment, the Fifth Amendment waiver designed by the *Miranda* decision is adequate. However, for purposes of protection from continued police interrogation after the Sixth Amendment right to counsel has been invoked, the Fifth Amendment protections contained in the *Edwards* decision are not appropriate. As the Michigan Supreme Court found, this argument ignores the differences between the two separate rights and in fact, denigates the Sixth Amendment right.

At the core of Petitioner's argument is the concept that the Sixth Amendment right is *not* the extensive right that this Court has recognized it to be. Petitioner argues that Respondent exercised only a "portion of his Sixth Amendment right" and that it was a "narrow right" he invoked at arraignment. (Petitioner's Brief at 34-35). The Sixth Amendment right to counsel has never been described in

the caselaw as a narrow right; certainly there is no authority for the proposition that the right can be exercised piecemeal. The Sixth Amendment right to counsel is a broad, fundamental right which, once attached, protects the defendant through *all* critical stages including interrogation. This Court should explicitly reject any argument which attempts to limit the critical Sixth Amendment right. Moreover, this Court should recognize, as did the Michigan Supreme Court, that providing less stringent safeguards for the Sixth Amendment right than the corresponding Fifth Amendment right effectively diminishes the importance of the Sixth Amendment.

In support of his argument, Petitioner relies primarily on decisions from the Fifth Circuit Court of Appeals. *Nash* v. *Estelle*, 597 F.2d 513 (CA 5, 1979); *Blassingame* v. *Estelle*, 604 F.2d 893 (CA 5, 1979); *Jordan* v. *Watkins*, 681 F.2d 1067 (CA 5, 1982). However, two of these cases were decided prior to *Edwards* while none of the cases "adequately distinguished the Fifth and Sixth Amendment rights." *People* v. *Bladel*, supra, 421 Mich. at 56.

In *Blassingame* v. *Estelle*, 604 F.2d 893 (CA 5, 1979), the defendant had been arraigned and had requested counsel prior to the interrogation which resulted in a confession. Inexplicably, the Fifth Circuit ignored the Sixth Amendment implications of the post-arraignment interrogation and found simply that the defendant had waived his Fifth Amendment rights prior to the confession. In *Jordan* v. *Watkins*, 681 F.2d 1067 (CA 5, 1982), the Court did briefly acknowledge that the defendant's Sixth Amendment right had attached at the arraignment. The Court then found that the post-arraignment interrogation was proper. Relying heavily on *Blassingame*, the Fifth Circuit found a voluntary, knowing and intelligent waiver of both the Fifth and Sixth Amendment rights to counsel. The *Jordan* Court distinguished *Edwards* because Jordan never invoked his right to counsel *during interrogation* and, therefore, did not indicate a desire to deal with police only through counsel. *Id.* at 1073.

As demonstrated above and as aptly stated by the Michigan Supreme Court, it should make no difference if a defendant directs his request for counsel to a judge as opposed to the police. Indeed, an average defendant may well assume that a request directed to a neutral judicial magistrate would be more likely to be honored. Unfortunately for Respondent Bladel, his request for counsel, directed to the district court judge, did not result in counsel until four days later, one day after Respondent's counselless, uncounseled confession.

A further problem with the Fifth Circuit line of cases cited by the Petitioner is that the Fifth Circuit is not at all consistent on the application of *Edwards* to post-arraignment confessions where the only request for counsel is made at arraignment. In *Silva* v. *Estelle*, 672 F.2d 457 (CA 5, 1982), defendant, *at arraignment*, requested to use the telephone to call his attorney. Approximately one hour after arraignment, defendant was approached by a police officer whereupon defendant waived his *Miranda* rights and dictated a written confession. Finding that defendant's request to call his lawyer "can only be construed as an exercise by the defendant of his right to an attorney," *Id.* at 458, the Fifth Circuit held that *Edwards* prohibited the later interrogation. The Court consequently found the confession inadmissible and reversed the conviction.

The Sixth Circuit has also applied the *Edwards* rule in a Sixth Amendment context. In *United States* v. *Campbell*,

721 F.2d 578 (1983), defendant was interrogated and confessed after his request for counsel at arraignment but before he had the opportunity to consult with counsel. Despite the apparent *Miranda* waiver at the post-arraignment interrogation, the Sixth Circuit held that *Edwards* barred the interrogation and prevented a finding of waiver. The Court specifically found that the interrogation of the defendant in the absence of counsel manifested "an indifference to, if not an intentional disregard for, an accused's Sixth Amendment right to counsel and Fifth Amendment right against self-incrimination." *Id*, at 579. Because the agents knew that an attorney had been appointed (as did the interrogating officers in the instant case), the Court found that the government agents intentionally conducted "one last round of interrogation before [defendant] would have an opportunity to consult with counsel." *Id*.

Like the defendants in both *Silva* and *Campbell*, Respondent herein requested counsel only at arraignment and was then subjected to counselless, police-initiated interrogation by officers who were aware of the request for counsel. As Justice Marshall has stated, admission of the confession under such circumstances indicates a total disregard for the defendant's request for counsel and violates the spirit, if not the letter, of the *Edwards* decision. *Johnson* v. *Virginia*, 454 U.S. 920; 120 S.Ct. 422; 70 L.Ed.2d 231 (1981) [Marshall, J., dissenting].

Accordingly, Respondent's Sixth Amendment request for counsel is at least entitled to as much protection as an exercise of Respondent's Fifth Amendment rights would be. This Court should affirm the decision of the Michigan Supreme Court and find that it is appropriate and constitutionally necessary to extend the *Edwards* rule to situa-

tions where the accused has requested counsel at arraignment.

The Ruling Of The Michigan Supreme Court Is A "Bright Line" Rule Which Furthers The Purpose Of The Sixth Amendment Right To Counsel And Clearly Outlines The Rights Of The Defendant And The Duties Of The Police At Post-Arraignment Interrogations.

The decision of the Michigan Supreme Court will not, as Petitioner argues, result in confusion and guesswork by the police. In fact, the Court's decision to apply the *Edwards* safeguards to the Sixth Amendment is merely a rational extension of the "bright line" rule announced in *Edwards*. Thus, the Michigan ruling is both practical and constitutionally appropriate. Courts will no longer have to attempt to determine which right to counsel the defendant has invoked. Moreover, courts will no longer have to draw unnecessary distinctions over where or to whom the request for counsel is directed. The Michigan Supreme Court has greatly simplified the matter: any request for counsel by a criminal suspect or criminal defendant bars further police initiated interrogation.

The Michigan Supreme Court also held that the police, prior to interrogating a defendant must determine whether the defendant has been arraigned and has requested counsel. Clearly such a requirement is reasonable and necessary if the police are to scrupulously protect a defendant's right to counsel. Petitioner argues, however, that the police often do not know if counsel has been requested, and therefore, "would be left to guesswork in determining whether it is proper to interview a particular prisoner . . ." (Petitioner's Brief at 43).

This argument is specious. Respondent submits that even if the interrogating officer is not present at arraignment, only a very lazy police officer would be "left to

guesswork." A simple check with the court clerk or the prosecuting attorney could easily verify the defendant's status. As the Michigan Supreme Court observed, "[t]his duty is no more onerous than that imposed by *Edwards* . . ." *People* v. *Bladel*, supra, 421 Mich. at 66. Moreover, in this case, the chief investigating officer was present at Respondent's arraignment while the two interrogating officers were informed by Respondent of his request for counsel.

The interrogation of Respondent Bladel in the absence of counsel by police officers who were aware that Respondent had requested counsel was not a good faith action by the police. It was, as recognized by the Michigan Supreme Court, a deliberate attempt to conduct "one last round' of interrogation before counsel arrived." *Id.*, at 67. The officers exhibited at least an indifference to Respondent's request which negates any notion of good faith. If the police had intended to respect Respondent's right to counsel. they would have postponed the interrogation until Respondent had the opportunity to consult with counsel. Moreover, once the defendant's right to counsel has attached, the focus must be on the rights of the defendant not the culpability or innocence of the police. See *United States* v. *Agurs*, 427 U.S. 97, 109; 96 S.Ct. 2392; 29 L.Ed.2d 342 (1976).

Finally, the ruling of the Michigan Supreme Court will not negatively effect the ability of the police to solve crime. If anything, this decision will help assure that confessions are voluntary and not taken in violation of a defendant's right to counsel. In *Escobedo* v. *Illinois*, 378 U.S. 478, 489; 84 S.Ct. 1758, 1764; 12 L.Ed.2d 977 (1964), this Court recognized that law enforcement dependent upon confessions will be "less reliable and more subject to abuses than a system which depends upon extrinsic evi-

dence . . ." . The Court further noted that the State should not fear that honoring a suspect's rights will result in less confessions:

> This Court also has recognized that "history amply shows that confessions have often been extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence. . . ." *Haynes* v. *Washington*, 373 U.S. 503, 519, 10 L.Ed.2d 513, 524, 83 S.Ct. 1336, 1346.
>
> We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system. 378 U.S. at 490; footnotes omitted.

Similarly, there is no reason to fear the rule announced by the Michigan Supreme Court herein. Extending the *Edwards* rule to the facts of the instant case will only have the positive effect of protecting the indicted defendant in the exercise of his constitutional right to counsel. As the ultimate arbiter of the rights of the citizens of this country, this Court should embrace and affirm that rule.

Respondent Bladel's Fifth Amendment Right To Counsel Was Violated Where The Police Interrogated Respondent After Being Advised That He Had Already Requested The Appointment Of Counsel.

Notwithstanding the analysis of Respondent's Sixth Amendment right to counsel, Respondent submits that his Fifth Amendment right was violated under *Edwards*

v. *Arizona*, supra, when the police continued interrogation after being advised by Respondent that he had requested counsel at arraignment.

According to the testimony of the two interrogating officers, Respondent advised the officers, prior to interrogation, that he had requested counsel at arraignment, that he had not yet seen an attorney and that he didn't know whether one had been appointed. Sergeant Wheeler described the exchange with Respondent as follows:

> Q. But, he did tell you that he had requested an attorney?
>
> A. Yes, sir.
>
> Q. And one hadn't shown up?
>
> A. Well, whether one hadn't shown up or he didn't know whether he had been appointed or not. Let's put it that way, he said he had requested one, but didn't know whether one had been appointed or not. (JA 49a)

Lieutenant Lowe also testified that he was advised by Respondent of his request for counsel:

> Q. All right, were you present when these rights were read to the defendant, Mr. Bladel?
>
> A. On the 26th of March, sir.
>
> Q. Yes.
>
> A. Yes, sir.
>
> Q. Did you hear Mr. Bladel state that he had requested an attorney?
>
> A. He had requested, yes, I heard him say that he had requested an attorney at his arraignment, sir.

> Q. Did you ask him whether or not he had seen an attorney?
>
> A. I think Mr. Bladel, his statement was that he had requested one at his arraignment, but he hadn't seen him yet. (JA 65a-66a).

Despite Respondent's clear statement to both officers that he had requested an attorney, the officers responded with complete indifference:

> Q. At any time did you attempt to ascertain whether or not an attorney had been appointed for Mr. Bladel?
>
> A. No, sir.
>
> Q. Did this become of concern to you after you read him his rights and that he reported to you that he had requested an attorney?
>
> A. No concern whatsoever. (JA 41a) [Testimony of Sgt. Wheeler]
>
> * * *
>
> Q. Did you cease questioning after he stated that he had requested an attorney?
>
> A. He didn't request an attorney be present during this interview, sir, his request was that he had said that he had requested an attorney at his arraignment.
>
> Q. And after learning that he had requested an attorney at the arraignment did you stop questioning at that point?
>
> A. No, sir, he was advised that if he wished to have an attorney present during this questioning that then he could at any time he wished have his attorney present.
>
> Q. Did you cease to question, did you cease the interview after you were informed that he had requested an attorney?

A. No, we did not. (JA 66a) [Testimony of Lt. Lowe].

It is critical that Respondent's statement that he had requested a lawyer followed immediately after the *Miranda* warnings. In direct response to the *Miranda* advice that a lawyer would be appointed, Respondent indicated that that would not be necessary, as *he had already requested a lawyer.* Respondent apparently believed that he had exercised his right to have counsel present at all stages of the proceedings including interrogation. The police, by their own testimony, simply chose to ignore Respondent's request for counsel.

In *Edwards* v. *Arizona*,supra, this Court imposed the rigid rule that once an accused indicates to the police that he desires counsel present during interrogation, the police may not initiate any further attempts to invite the accused to waive that right. The purpose of this rule is "to protect an accused in police custody from being badgered by police officers . . ." into waiving his rights once asserted. *Oregon* v. *Bradshaw,* 462 U.S. 1039; 103 S.Ct. 2830, 2834; 77 L.Ed.2d 405 (1983). The effectiveness of the request for counsel does not depend upon the accused's utterance of specific words or phrases. So long as the accused clearly indicates that he wants an attorney, the interrogation must cease. *Smith* v. *Illinois,* 469 U.S. ___; 105 S.Ct. 490; 83 L.Ed.2d 488 (1984).

In the instant case, given that Respondent requested counsel at arraignment and then advised the interrogating officers of this request immediately after the *Miranda* warnings, it must be concluded that Respondent had done all that he could to preserve his rights to counsel under both the Fifth and Sixth Amendments. Moreover, these circumstances should have been sufficient to alert the police that Respondent had exercised his rights. At that

point, the police were on notice that Respondent had made the decision that he was not capable of dealing with the prosecutorial forces without counsel. By having "no concern whatsoever" (JA 51a) that Respondent had invoked his right to counsel, the police effectively badgered Respondent into giving up his previously asserted right.

In deciding whether Respondent's statement that he had requested counsel should be viewed as an exercise of his right to counsel at interrogation, this Court should also examine the circumstances in which Respondent found himself when confronted by the police. Respondent was not only without counsel but he had been incarcerated for three days after his initial request without having consulted with counsel. As the record demonstrates, the delay in providing counsel was due to the district court's failure to immediately contact an attorney (JA 104a). Thus, the interrogating officers encountered Respondent at a time when he did not know what had become of his request for counsel and when "he began to doubt whether he would have counsel appointed." *People* v. *Bladel,* supra, 421 Mich. at 67. Moreover, the police did not know whether counsel had been appointed and admittedly, did not care.

Under the circumstances of this case, Respondent's communication to the police was the functional equivalent of a request for counsel at interrogation. Since the police proceeded to obtain a waiver and to interrogate Respondent after being advised of his request, the rule of *Edwards*, and, therefore, *Miranda* v. *Arizona*, supra, was violated. Respondent's confession must be suppressed.

CONCLUSION AND RELIEF

The interrogation of Respondent Bladel following his unequivocal request for counsel at arraignment was a violation of Respondent's Sixth Amendment right to counsel. The Michigan Supreme Court correctly analyzed the Constitution in arriving at this decision. This Court should adopt and affirm that decision. Alternatively, Respondent's indication to the police, in response to the *Miranda* advice that counsel would be appointed, that he had requested counsel was a sufficient exercise of Respondent's Fifth Amendment right under *Edwards* v. *Arizona*. Thus, the continued interrogation violated Defendant's Fifth Amendment right to counsel.

The decision of the Michigan Supreme Court was based in equal part on both the Michigan and Federal Constitutions. Thus, this case should minimally be remanded to the Michigan Supreme Court for reconsideration on state grounds if this Court reverses the decision of that Court.

WHEREFORE, Respondent respectfully requests this Court to affirm the decision of the Michigan Supreme Court.

Respectfully submitted,

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